

Department of Defense

§ 9901.721

review the evidence, and to furnish affidavits and other documentary evidence, if the employee is otherwise in an active duty status.

(d) An official will be designated to receive the employee's written and/or oral response. The official will have authority to make or recommend a final decision on the proposed adverse action.

(e) The employee may be represented by an attorney or non-Federal employee representative, at the employee's expense, or other representative of the employee's choice, subject to paragraph (f) of this section. The employee will provide a written designation of his or her representative.

(f) An employee's representative may be disallowed if the representative is—

(1) An individual whose activities as representative would cause a conflict between the interest or position of the representative and that of the Department,

(2) An employee of the Department whose release from his or her official position would give rise to unreasonable costs or whose work assignments preclude his or her release; or

(3) An individual whose activities as representative could compromise security.

(g)(1) An employee who wishes consideration of any medical condition that may be relevant to the proposed adverse action will provide medical documentation, as that term is defined at 5 CFR 339.104, during the opportunity to reply, whenever possible.

(2) A medical examination may be required or offered pursuant to 5 CFR part 339, subpart C, when an employee's medical documentation is under consideration.

(3) Withdrawal or delay of a proposed adverse action is not required when an employee's medical condition is under consideration. However—

(i) The employee will be allowed to provide medical documentation during the opportunity to reply;

(ii) Compliance with 29 CFR 1614.203 and relevant Equal Employment Opportunity Commission rules will occur; and

(iii) Compliance with 5 CFR 831.1205 or 844.202, as applicable, will occur in the issuance of a decision to remove.

§ 9901.716 Decision notice.

(a) Any reasons for the action other than those specified in the proposal notice may not be considered in a decision on a proposed adverse action.

(b) Any response from the employee and the employee's representative, if the response is provided to the official designated under § 9901.715(d) during the opportunity to reply period, and any medical documentation furnished under § 9901.715(g) will be considered.

(c) The decision notice will specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under subparts H or I of this part.

(d) To the extent practicable, the notice to the employee will be delivered on or before the effective date of the action. If delivery cannot be made to the employee in person, the notice may be delivered to the employee's last known address of record on or before the effective date of the action.

§ 9901.717 Departmental record.

(a) *Document retention.* The Department will keep a record of all relevant documentation concerning the action for a period of time pursuant to the General Records Schedule and the Guide to Personnel Recordkeeping. The record will include the following:

- (1) A copy of the proposal notice;
- (2) The employee's written response, if any, to the proposal;
- (3) A summary of the employee's oral response, if any;
- (4) A copy of the decision notice; and
- (5) Any supporting material that is directly relevant and on which the action was substantially based.

(b) *Access to the record.* The Department will make the record available for review by the employee and furnish a copy of the record upon the employee's request or the request of the Merit Systems Protection Board (MSPB), but not less than 15 days after such a request.

SAVINGS PROVISION

§ 9901.721 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee's coverage under this subpart.